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Supreme Court of the United States

OCTOBER TERM, 1941.

LEO P. MIRSKY,

Petitioner
(Appellee Below),

—against—

CONLEW, INC.,

Respondent
(Appellant Below).

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

HORACE G. MARKS AND
DAVID HAAR,
Attorneys for Petitioner.

DAVID HAAR,
On the Brief.

THE COURT PRESS, N. Y. C.

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BRIEF:

POINT I—The decision of the Circuit Court of Appeals on the facts in this case, is in conflict with decisions of other Circuit Courts and of this Court on similar facts. Therefore this case is properly subject to a writ of certiorari. 8

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OTHER AUTHORITIES CITED:

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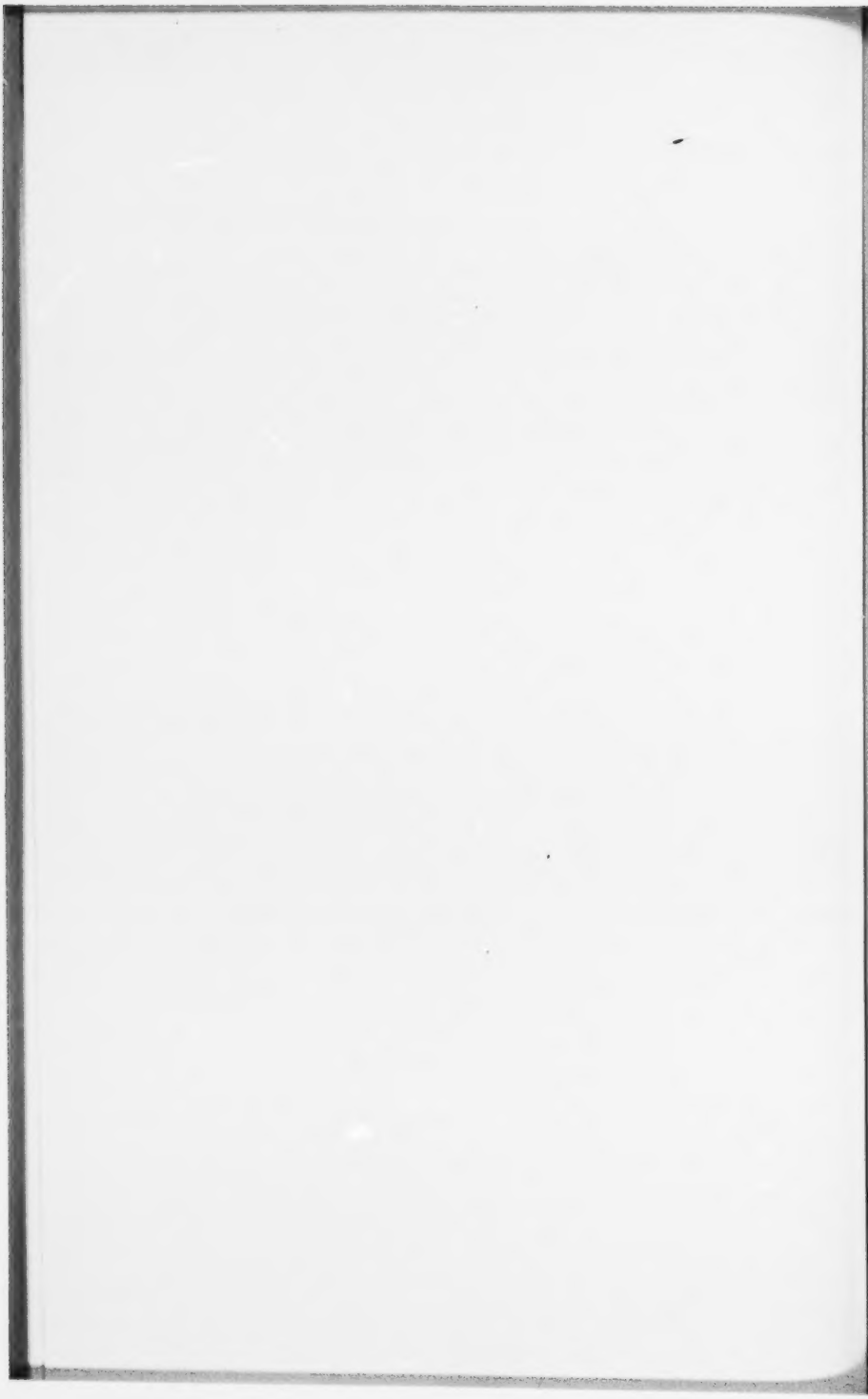

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OCTOBER TERM, 1941.

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(Appellee Below),

—against—

CONLEW, INC.,

Respondent
(Appellant Below).

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Leo P. Mirsky, prays that a writ of certiorari issue out of this court to review an order of the Circuit Court of Appeals for the Second Circuit, entered in the above proceedings on January 29th, 1942. This order reversed an order of the District Court for the Eastern District of New York, which in turn approved the recommendation of Hon. Henry C. Frey (the referee in charge of your petitioner's bankruptcy proceeding), to the effect that the estate should not be reopened for administering what was claimed to be unadministered assets. The referee's report further recommended that an ex-parte order, theretofore granted permitting the re-opening of the estate upon the petition of Conlew, Inc.,

the appellee herein, should be vacated and the application to reopen the estate denied.

The effect of the decision of the Circuit Court of Appeals now sought to be reviewed, is to reopen the petitioner's bankruptcy, which had been closed on January 15th, 1935 (fol. 44). The petitioner, as bankrupt, was duly discharged prior thereto (fol. 44). The ex-parte order which is the basis of this controversy, was made by a Judge of the United States District Court for the Eastern District of New York over five years later, to wit, October 9th, 1940.

The opinion of the Circuit Court of Appeals is printed at page 30 (fol. 88) of the record submitted herewith.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13th, 1925, Chapt. 229, Sec. 1, 28 U. S. C. A., Sec. 347 (a).

The basis of the decision of the Circuit Court of Appeals is contrary and in conflict with cases in other circuits involving the same issue, and is likewise contrary to cases decided by this Court, involving the rights of creditors to reopen a bankruptcy case on the claim that there are unadministered assets.

Moreover, in so far as the decision appears to lay down the rule that there rests a duty upon a bankrupt who has set forth all his assets in his schedules to "seek a specific order of abandonment", if he is to avoid an order opening the estate five years later, such a requirement is not required by the Bankruptcy Act, which specifically sets forth the duties imposed upon a bankrupt—and this is not one of them.

Summary Statement of the Issue Involved.

On August 27th, 1934, Leo P. Mirsky, the petitioner, filed a voluntary petition in bankruptcy with the Clerk of the United States District Court for the Eastern District of New York. He was adjudicated a bankrupt on August 28th, 1934 (fol. 9). The first meeting of creditors was held on September 18th, 1934, before Hon. Henry C. Frey, one of the duly designated referees in bankruptcy for the Eastern District (fol. 9).

As required by law, the petitioner bankrupt filed his schedules. In Schedule B-4, the petitioner stated that he had an asset of unknown value, consisting of a possible interest in a trust fund created by the will of Henry Ettelson, deceased. Under the provisions of that will, the New York Trust Company, designated as trustee, was required to pay to petitioner's mother two-thirds of the income of the fund during her life. In the event that the income was less than $50 a month, the trustee was permitted to resort to the principal so as to reach the $50 a month requirement (fol. 10). Upon the death of the bankrupt's mother, two-thirds of the balance of the principal not exhausted, plus the accrued income, should then be paid in equal shares, per stirpes, to the lineal descendants of Mrs. Mirsky, the mother of the bankrupt (fol. 11).

The existence of this possible contingent asset thus being disclosed, and having been called to the attention of the creditors at the first meeting and the referee who presided, the creditors did not call for the appointment of a trustee, and the meeting was closed (fol. 11). On December 21st, 1934, the petitioner was discharged of all his debts, and on January 15th, 1934 the referee made an order which was duly filed, closing the case (fol. 12).

It further appears that at this first meeting of creditors,

the value of this possible contingent claim was inquired into by the referee (fols. 42-43).

In his report to the Court, Referee Frey states that no proof was offered before him on the motion, and there was no evidence, that the bankrupt's expectancy, listed as it was in his schedules in 1934, had any value at the time of his adjudication (fol. 60). He further observes that it was possible that the subject of the trust had acquired all, or most, of its value since that date. He also states that "concededly the bankrupt made a full disclosure, both in his schedules and at his hearing before creditors" with respect to this contingent claim (fol. 60).

It appears also from Referee Frey's report, that no creditors manifested any interest in the estate during its period of administration. The referee himself made an effort to get a bid for this expectancy, but without avail. For that reason no trustee was appointed, as there was nothing to administer (fol. 54).

The contingent asset listed by the bankrupt in his schedules in August of 1934, acquired value by the death of the beneficiary in 1940 (fol. 54). It was at that time that the bankrupt's expectancy became vested and acquired what is called a "present value", because the bankrupt was one of the lineal descendants of Mrs. Mirsky (fol. 54).

Thereupon, Conlew, Inc., the respondent herein and a creditor, obtained an ex-parte order for the reopening of the estate, and to have a trustee elected (fol. 54). The bankrupt applied for an order to vacate this ex-parte order, on the ground that his estate was fully administered and closed "after full disclosure of this expectancy more than six years ago and that therefore there was an abandonment on the part of the creditors of any interest or right in this expectancy" (fols. 54-55). Referee Frey apparently recommended that the bankrupt's motion be granted (fols. 62-63).

United States District Judge Abruzzo, in his opinion (fols. 64 to 70) approved the recommendation of Referee Frey in view of the facts presented and the law discussed by him based on various authorities (fols. 68-69). He thereupon entered an order vacating the ex-parte order of October 17th, 1940 (fol. 74).

It is this order of July 15th, 1941, made by Judge Abruzzo, that was the subject matter of the appeal to the Circuit Court of Appeals on behalf of the respondent, Conlew, Inc., and it is this order that the Circuit Court of Appeals reversed, with a brief opinion (fol. 88). This reversal resulted in the mandate (fol. 95) which is the subject of this petition for a writ of certiorari to the Circuit Court of Appeals in the Second Circuit.

Your petitioner believes that his rights have been prejudiced by this reversal. Your petitioner is also advised by his counsel that the opinion of the Circuit Court for the Second Circuit, is not in accord with the rules of law laid down by this Court on similar facts, and also that it is in conflict with decisions in other Circuit Courts on similar facts.

The point is argued in a brief submitted herewith by petitioner's counsel.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue out of this Court, directed to the Circuit Court of Appeals for the Second Circuit, requiring that Court to certify and send to this Court a full and complete transcript of the record of proceedings in said Circuit Court of Appeals entitled "*In the Matter of Leo P. Mirsky,* Bankrupt, *Conlew Inc.,* Creditor-Appellant, *Leo P. Mirsky,* Bankrupt-Appellee", to the end that the case may be reviewed and determined by this Court as provided by law, and that your petitioner may have such

other and further relief in the premises as to this Court may seem just.

LEO P. MIRSKY,
Petitioner.

United States of America,
Southern District of New York—ss.:

Leo P. Mirsky, being duly sworn, deposes and says that he is the petitioner herein; that he has read the foregoing petition and the same is true as he verily believes.

LEO P. MIRSKY.

Sworn to before me this
26th day of May, 1942.

Robert H. Epstein,
Notary Public,
Bronx County.

Certificate of Counsel.

I hereby certify that I have read the foregoing petition and in my opinion it is well founded and deserves the favorable consideration of this Court.

DAVID HAAR,
Attorney and Counsel
for Petitioner.

Horace G. Marks and
David Haar,
Attorneys for Petitioner.